

RECEIVED  
FEDERAL ELECTION  
COMMISSION

FEDERAL ELECTION COMMISSION  
999 E Street, NW  
Washington, DC 20463

2012 SEP -6 PM 6: 59

FIRST GENERAL COUNSEL'S REPORT

CELA  
SENSITIVE

MUR 6558

DATE RECEIVED: April 17, 2012

DATE OF NOTIFICATION: April 24, 2012

LAST RESPONSE RECEIVED: May 15, 2012

DATE ACTIVATED: June 8, 2012

EARLIEST SOL: March 30, 2017

LATEST SOL: Continuing

COMPLAINANTS:

Todd Weiler

Richard Jaussi

RESPONDENT:

Brian Jenkins

RELEVANT STATUTES AND  
REGULATIONS:

2 U.S.C. § 431(2)

2 U.S.C. § 431(8)(A)

2 U.S.C. § 431(9)(A)

2 U.S.C. § 432(e)(1)

2 U.S.C. § 433

2 U.S.C. § 434(a)

2 U.S.C. § 441d

11 C.F.R. § 100.3(a)

11 C.F.R. § 101.1(a)

11 C.F.R. § 102.1(a)

11 C.F.R. § 104.1(a)

11 C.F.R. § 104.5

11 C.F.R. § 110.10

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint in this matter alleges that Brian Jenkins, a candidate for the Republican nomination for United States Representative for the 3rd Congressional District of Utah, violated the Federal Election Campaign Act of 1971, as amended, (the "Act") when he failed to file a Statement of Candidacy, Statement of Organization, and the required disclosure reports with the

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT  
2012 SEP -7 AM 9: 45

12044322663

1 Commission. Compl. at 1. To support the allegations that Jenkins was a candidate, the  
2 Complaint states that Jenkins filed with the State of Utah a Declaration of Candidacy and paid  
3 the required \$435 state filing fee, created a campaign website, made "countless appearances" at  
4 campaign events, and made references to himself as a candidate for Congress. Compl. at 1-2.  
5 The Complaint also alleges that Jenkins placed automated calls identifying himself as a  
6 candidate for Congress to 4,000 delegates attending the Utah Republican Party state convention,  
7 and that these automated calls to delegates did not include required disclaimers in violation of  
8 the Act. *Id.* at 2.

9 In the Response, Jenkins generally denies the allegations, but does not specifically  
10 address the substance of the allegations or provide any factual information.<sup>1</sup> Resp. at 2.

11 Because the available evidence indicates that it is unlikely that Jenkins exceeded the  
12 \$5,000 threshold to become a candidate under 2 U.S.C. § 431(2) and trigger any reporting  
13 obligations under 2 U.S.C. § 432(e)(1), we recommend that the Commission find no reason to  
14 believe that Jenkins violated 2 U.S.C. § 432(e)(1) by failing to file a Statement of Candidacy.  
15 We also recommend that the Commission exercise its prosecutorial discretion and dismiss the  
16 allegations that Jenkins violated 2 U.S.C. § 441d and 11 C.F.R. § 110.1 by failing to include the  
17 required disclaimers on automated calls placed to delegates.

## 18 II. FACTS

19 Brian Jenkins sought the Republican nomination for United States Representative for the  
20 3rd Congressional District at the Utah Republican Party state convention, which was held on

---

<sup>1</sup> Jenkins's Response also challenges the Commission's authority to take any action against him and asserts that the Commission's notification letter is "an attempt to deny me of my right of privacy, right to buy services with my money and my right to run for a federal government office," citing to Article VI and Amendment IX of the United States Constitution, and the Declaration of Independence. Resp. at 1-2. The Response further states that the Commission's failure to provide "necessary documents or legal authorities" establishing the constitutionality of the Commission's actions within 15 days of receipt of the Response would constitute "acquiescence that I have done no wrong, upon which this matter will be closed with prejudice." *Id.* at 2. The challenges are meritless.

1 April 21, 2012. On March 14, 2012, Jenkins filed a Declaration of Candidacy with the State of  
2 Utah. Brian Jenkins Declaration of Candidacy,  
3 [http://www.elections.utah.gov/Media/Default/2012%20Candidate%20Filings%20%20Thursday](http://www.elections.utah.gov/Media/Default/2012%20Candidate%20Filings%20%20Thursday%2015/Emailed%20Candidate%20Filings/Brian%20Jenkins%20US%20House%203.pdf)  
4 [%2015/ Emailed%20Candidate%20Filings/Brian%20Jenkins%20US%20House%203.pdf](http://www.elections.utah.gov/Media/Default/2012%20Candidate%20Filings/Brian%20Jenkins%20US%20House%203.pdf)  
5 (“Declaration”); *see* UTAH CODE § 20A-9-201 (requiring individuals wishing to run for Congress  
6 to submit a Declaration of Candidacy and pay a filing fee). In an Affidavit of Impecuniosity  
7 filed with his Declaration, Jenkins attested that, “owing to my poverty, I am unable to file the  
8 filing fee required by law.” *Id.*; *see* UTAH CODE § 20A-9-201(5)(d) (stating that a candidate  
9 “may file a declaration of candidacy without payment of the filing fee upon a prima facie  
10 showing of impecuniosity as evidenced by an affidavit of impecuniosity filed with the filing  
11 officer”).

12 It also appears that Jenkins created at least two websites promoting his candidacy:  
13 [www.brianforutah.com](http://www.brianforutah.com) and [www.brianforutah.info](http://www.brianforutah.info). The first website, [www.brianforutah.com](http://www.brianforutah.com), is  
14 still available as of September 5, 2012, and appears to be hosted by 1&1 Internet, Inc. Although  
15 we do not know what Jenkins paid for the website, 1&1 advertises free domain names, free  
16 templates to create your own website up to six pages, and monthly web hosting fees as low as  
17 \$6.99 per month. *See* Linux Web Hosting, [http://www.1and1.com/linux-web-](http://www.1and1.com/linux-web-hosting?linkOrigin=how-to-create-a-website&linkId=hd.mainnav.hosting)  
18 [hosting?linkOrigin=how-to-create-a-website&linkId=hd.mainnav.hosting](http://www.1and1.com/linux-web-hosting?linkOrigin=how-to-create-a-website&linkId=hd.mainnav.hosting). The website has six  
19 pages of content and provides information on Jenkins’s positions and the use of electronic voting  
20 at the state convention.<sup>2</sup>

---

<sup>2</sup> Just prior to the convention, the Utah Republican Party announced that it would be using an electronic voting system at the convention in place of paper ballots. The new system was contested by some, including Jenkins, whose two campaign websites dedicate a significant percentage of space to the issue. *See* Ladd Brubaker, *Utah GOP Convention Going Electronic, But Not Without Controversy*, DESERET NEWS (Apr. 16, 2012), <http://www.deseretnews.com/article/865554164/Utah-GOP-convention-going-electronic-but-not-without-controversy.html?pg=all>.

1 The second website, www.brianforutah.info, is also still available as of September 5,  
2 2012, and appears to be created using a free website creator offered by Webs, Inc., a Vistaprint  
3 company. Webs, Inc. offers free domain names and free templates, with monthly web hosting  
4 fees as low as \$7.50 per month. See Webs Pricing, http://www.webs.com/pricing.htm. The  
5 website has similar content to Jenkins's other site, and also includes a "donate" button, which  
6 takes potential donors to a page that states: "When people give \$5.00 to the campaign it makes  
7 the wheels of freedom turn. Small, efficient campaigns in which everyone is donating their time  
8 and money tend to be efficient." The page indicates that donations can be made by e-mail or  
9 telephone using PayPal, and provides Jenkins's contact information. Neither website includes  
10 any disclaimers.

11 According to the Complaint, on or around April 10, 2012, Jenkins placed automated  
12 telephone calls to the 4,000 delegates attending the Utah Republican Party's state convention.  
13 Compl. at 2. The Complaint did not include a recording or transcript of the call, but states that  
14 Jenkins clearly identified himself as "Brian Jenkins, Candidate for Congress," and "proceed[ed]  
15 with his message to instill fear and mistrust in the election process, state party officers, etc.,  
16 which is a common theme of his campaign rhetoric." *Id.* The Complaint alleges that the  
17 message did not identify who paid for the call. *Id.* According to one press report, Jenkins has  
18 acknowledged that he "sent automated calls to all 4,000 delegates with a recorded message  
19 warning against the electronic balloting system" and paid "about \$75" to make these robocalls  
20 using the state party treasurer's calling equipment. See Ladd Brubaker, *Utah GOP Convention*  
21 *Going Electronic, But Not Without Controversy*, DESERET NEWS (Apr. 16, 2012),  
22 http://www.deseretnews.com/article/865554164/Utah-GOP-convention-going-electronic-but-not-  
23 without-controversy.html?pg=all.

12044322666

Jenkins did not secure the Republican nomination at the convention, receiving the votes of 29 of the 947 delegates, or 3.06% of the vote. Jenkins did not file with the Commission a Statement of Candidacy, designate or register a principal campaign committee, or file any disclosure reports.<sup>3</sup>

### III. LEGAL ANALYSIS

#### A. Failure to File Statement of Candidacy, Statement of Organization, and Pre-Convention Report

The Complaint alleges that Jenkins failed to file: (1) a timely Statement of Candidacy; (2) a timely Statement of Organization; and (3) a pre-convention report disclosing receipts and disbursements. Compl. at 1-2. The Complaint bases these allegations on the fact that Jenkins created a campaign website, made "countless appearances to campaign events," made "numerous references to himself as a 'candidate for congress,'" and then subsequently paid a \$435 filing fee on March 15, 2012. Compl. at 1. In response, Jenkins generally denies the allegations and argues that the complainants fail to provide proof other than their "own self conclusory statements supported by no evidence." Resp. at 2.

An individual seeking nomination for election becomes a candidate under the Act when that individual receives contributions or makes expenditures aggregating in excess of \$5,000. 2 U.S.C. § 431(2); *see also* 11 C.F.R. § 100.3(a). The Act defines a contribution as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i); *see also* 11 C.F.R. § 100.52. An expenditure is defined as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of

---

<sup>3</sup> Jenkins also unsuccessfully sought the Republican nomination for United States Senate in 2006 and United States Representative for the 2nd Congressional District in 2008. He also did not file a Statement of Candidacy, designate or register a principal campaign committee, or file any disclosure reports with the Commission for those races.

influencing any election for Federal office.” 2 U.S.C. § 431(9)(A)(i); *see also* 11 C.F.R. § 100.111. Ballot access fees paid by a candidate are expenditures that count towards the \$5,000 threshold under 2 U.S.C. § 431(2).

A candidate must file a Statement of Candidacy within 15 days after becoming a candidate. 11 C.F.R. § 101.1(a). The candidate also must designate a principal campaign committee on a Statement of Candidacy filed with the Commission. 2 U.S.C. § 432(e)(1); 11 C.F.R. § 101.1(a). Each authorized political committee of a candidate must register with the Commission by filing a Statement of Organization, and file reports disclosing contributions and expenditures. 2 U.S.C. §§ 433, 434(a); 11 C.F.R. §§ 102.1(a), 104.1(a), 104.5. Accordingly, if Jenkins received contributions or made expenditures aggregating in excess of \$5,000, he was a candidate pursuant to 2 U.S.C. § 431(2), and was required to file a Statement of Candidacy and designate a principle campaign committee, which would have to file a Statement of Organization and periodic reports disclosing the committee’s receipts and disbursements.

The Commission finds “reason to believe” in matters where the available evidence is “at least sufficient to warrant conducting an investigation, and where the seriousness of the alleged violation warrants either further investigation or immediate conciliation.” Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007) (“Statement of Policy”). The Commission will make a determination of “no reason to believe” a violation has occurred when the available information does not provide a basis for proceeding with the matter. *Id.* at 12,546. The Commission finds “no reason to believe” when the complaint, any response filed by the respondent, and any

12044322668

publicly available information, taken together, fail to give rise to a reasonable inference that a violation has occurred. *Id.*

Here, the available information is not sufficient to establish reason to believe that Jenkins became a candidate under the Act. The available information supports the Complaint's assertion that Jenkins made disbursements for campaign websites and automated calls to convention delegates. Moreover, because Jenkins reportedly used the state party treasurer's calling equipment to make the calls, Jenkins may have accepted an in-kind contribution from the state party treasurer if he was not charged the usual and normal rate for use of the equipment. *See* 11 C.F.R. § 100.52(d)(1). These receipts and disbursements, however, appear to be minimal. As discussed above, the two campaign websites appear to have been created using basic web host providers that allow individuals to obtain a domain name and create their own websites for free, and pay only a modest monthly fee to maintain the site. Similarly, the amounts disbursed in connection with the automated calls to the delegates were likely small.<sup>4</sup> A press report indicates that Jenkins paid "about \$75" to place the automated calls using the state party treasurer's calling equipment. *See Brubaker, supra*. Further, past matters involving automated calls to voters suggest that the cost of placing the 4,000 calls was likely minimal. *See, e.g.,* First Gen. Counsel's Rpt. at 6-7, MUR 6125 (McClintock) (spending \$7,799.13 for phone banks); Second Gen. Counsel's Rpt. at 2, MUR 5819 (U.S. Chamber of Commerce) (spending \$2,474 for 54,979 robocalls in Hawaii in 2006). Finally, while ballot access fees are expenditures, contrary to the Complaint's assertion that Jenkins paid a \$435 filing fee on March 15, 2012, as noted above, his filing with the State of Utah indicates that he received a waiver of the filing fee due to his

---

<sup>4</sup> Moreover, it is unclear whether any disbursements for the automated calls would constitute expenditures that count towards the \$5,000 threshold. *See* Section III.B, *infra*.

1 inability to pay. Accordingly, the total of Jenkins's known expenditures appears to have been  
2 less than the \$5,000 threshold under 2 U.S.C. § 431(2).

3 Moreover, while one of Jenkins's websites, www.brianforutah.info, solicited donations,  
4 we have no information suggesting that Jenkins solicited or raised more than the \$5,000  
5 threshold under 2 U.S.C. § 431(2). To the contrary, it appears that Jenkins solicited small  
6 contributions and used volunteers, since the website encourages potential donors to make \$5  
7 contributions to a "[s]mall, efficient campaign[] in which everyone is donating their time and  
8 money." See 11 C.F.R. § 100.74 (exempting volunteer services from the definition of  
9 contribution). The Complaint provides no specific information that Jenkins received in excess of  
10 \$5,000 in contributions.

11 This case is distinguishable from past matters where the Commission has found reason to  
12 believe that a violation has occurred and opened an investigation relating to the failure to file a  
13 Statement of Candidacy. In those matters, the Commission had additional information indicating  
14 that the candidate exceeded the \$5,000 threshold.

15  
16  
17  
18  
19  
20  
21  
22 Here, the available evidence does not provide a clear basis on which to find reason to  
23 believe and investigate whether Jenkins met or exceeded the \$5,000 threshold to become a

12044322670



1 candidate and trigger any reporting obligations under the Act pursuant to 2 U.S.C. § 431(2).  
2 Jenkins appears to have received a waiver of the State of Utah's filing fee "owing to [his]  
3 poverty," spent "about \$75" on automated calls to 4,000 delegates, created two websites,  
4 solicited small contributions and volunteers on one of his websites, and received only 3.06% of  
5 the vote. Accordingly, we recommend that the Commission find no reason to believe that  
6 Jenkins violated 2 U.S.C. § 432(e)(1) by failing to file a Statement of Candidacy.

7 **B. Failure to Include Disclaimers**

8 The Complaint alleges that Jenkins violated the Act by failing "to provide appropriate  
9 and necessary disclosures as required by BCRA for robodialed calls to delegates" that were made  
10 on or about April 10, 2012. Compl. at 2.

11 The Act and Commission regulations require a disclaimer when: (1) a political committee  
12 makes a disbursement for the purpose of financing a public communication, electronic mail of  
13 more than 500 substantially similar communications, or internet website; (2) any person makes a  
14 disbursement for the purpose of financing public communications expressly advocating the  
15 election or defeat of a clearly identified candidate; (3) any person solicits any contribution  
16 through a public communication; and (4) any person makes a disbursement for an electioneering  
17 communication. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a). A "public communication" is  
18 defined as a "communication by means of any broadcast, cable, or satellite communication,  
19 newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the  
20 general public, or any other form of general public political advertising." 11 C.F.R. § 100.26.  
21 A telephone bank "means more than 500 telephone calls of an identical or substantially similar  
22 nature within any 30-day period." 2 U.S.C. § 431(24); 11 C.F.R. § 100.28.

12044322671

1           If a communication requires a disclaimer and is paid for and authorized by a candidate,  
2 authorized political committee of a candidate, or its agents, the disclaimer shall clearly state that  
3 the communication has been paid for by such authorized political committee. 2 U.S.C.  
4 § 441d(a)(1); 11 C.F.R. § 110.11(b)(1). Disclaimers must be presented in a "clear and  
5 conspicuous manner" to give the listener "adequate notice of the identity of the person or  
6 political committee that paid for and, where required, that authorized the communication."  
7 11 C.F.R. § 110.11(c)(1).

8           As discussed above, there is record evidence giving rise to reason to believe that Jenkins  
9 disbursed funds to make automated calls to 4,000 delegates. *See* Compl. at 2; Brubaker, *supra*.  
10 Therefore, it appears that the calls constituted a public communication in the form of a telephone  
11 bank. *See* 11 C.F.R. §§ 100.26, 100.28. The available information, however, does not suggest  
12 that Jenkins exceeded the \$5,000 threshold to become a candidate pursuant to 2 U.S.C. § 431(2)  
13 or was required to register a political committee under 2 U.S.C. § 432(e)(1). Nor is there any  
14 allegation that Jenkins solicited contributions on the call. The telephone bank, therefore, was not  
15 a public communication paid for by a committee or containing a solicitation that required a  
16 disclaimer. *See* 2 U.S.C. § 441d(a). Further, the telephone bank does not meet the definition of  
17 an electioneering communication because it is not a broadcast, cable, or satellite communication.  
18 *See* 2 U.S.C. § 434(f)(3)(A).

19           Therefore, the communication only required a disclaimer if it expressly advocated for  
20 Jenkins's election. *See* 11 C.F.R. § 100.22. The Complaint asserts that Jenkins clearly identified  
21 himself as "Brian Jenkins, Candidate for Congress," but does not include a recording or  
22 transcript of the call or otherwise describe its content. *See* Compl. at 2.

12044322672

1           Given the paucity of the factual record and the small scope of the activity — 4,000 calls  
2   at a reported cost of \$75 — and the fact that Jenkins reportedly identified himself as responsible  
3   for the call, we do not think pursuing this matter with an investigation would be an efficient use  
4   of the Commission's resources, even if the content was such that the call clearly required a  
5   disclaimer. *See Heckler v. Chaney*, 470 U.S. 821 (1985); *cf.* First Gen. Counsel's Rpt. at 8,  
6   MUR 6125 (McClintock) (recommending that the Commission dismiss allegations that  
7   automated calls did not include the appropriate disclaimers and send a cautionary letter because  
8   the matter would require an investigation to determine the contents of calls, the respondents  
9   provided sworn assertions that they recorded the call with a disclaimer, the amount in violation  
10   was small, and the omission was likely a result of vendor error). Accordingly, we believe that  
11   the disclaimer allegations in the MUR should be dismissed.

12044322673

IV. RECOMMENDATIONS


1. Find no reason to believe that Jenkins violated 2 U.S.C. § 432(e)(1).
2. Dismiss the allegations that Jenkins violated 2 U.S.C. § 441d and 11 C.F.R. § 110.1.
3. Approve the appropriate letters.
4. Close the file.

Anthony Herman  
General Counsel

Daniel A. Petalas  
Associate General Counsel

9-6-12  
\_\_\_\_\_  
Date

BY:

  
\_\_\_\_\_  
Kathleen Guith  
Deputy Associate General Counsel

  
\_\_\_\_\_  
Allison T. Steinle  
Attorney

12044322674